take jurisdiction if it will be unable to enforce its decrees, or if the question involved depends peculiarly upon the law or policy of the domicile of the corporation.[20]

MUTUALITY IN THE SPECIFIC ENFORCEMENT OF CONTRACTS OF OPTION. —The obscurity which has enveloped the doctrine of mutuality in specific performance, though in large part dissipated by the researches of two learned writers,[1] is still the cause of considerable confusion of thought. The classic statement of the rule is: The contract must, as a general rule, be mutual, that is, such that it might, at the time it was entered into, have been enforced by either of the parties against the other.[2] But this imperfect generalization is subject to many exceptions. Thus, the fact that the plaintiff, an adult, was an infant at the inception of the contract,[3] or that he failed to sign the memorandum required by the Statute of Frauds,[4] or that he was unable to make a good title at the date of the contract or the filing of the suit,[5] constitutes no defense to a bill for specific performance. These exceptions are referable to the principle that the only mutuality required is that of the remedy at the time of the decree. And mutuality has been more accurately defined to mean that equity will not compel specific performance by a defendant, if after performance the common law remedy of damages would be his sole security for the performance of the plaintiff's side of the contract.[6] But the generally discarded idea that mutuality of obligation, as well as of remedy, is required, still persists in some jurisdictions, where specific performance of contracts of option for the sale of land is refused on the ground that the optionee is under no reciprocal duty to accept the option.[7]

An option contemplates either a bilateral or a unilateral contract. From an option of the first class a distinct bilateral contract arises upon the optionee's notice of acceptance;[8] if it be of the second class a tender of the purchase price gives to the optionor the complete *quid pro quo* for his promise. In the latter case the plaintiff has acquired a position identical with that of a party to a bilateral contract who has fully performed; hence, in either event, no effective defense can be interposed to the bill. A more difficult question arises where the optionor has endeavored to revoke the option during its life. If the option is but a contract to hold open an offer, its breach

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[20]See Babcock *v.* Farwell (1910) 245 Ill. 14.

[1]J. B. Ames in 3 COLUMBIA LAW REVIEW, 1; W. D. Lewis in 49 Amer. Law Reg. 270, 319, 383, 447, 507, 559 and 50 Amer. Law Reg. 65, 251, 329, 523.

[2]Fry, Specific Performance (5th ed.) 231; see also 4 Pomeroy, Eq. Juris. (3rd ed.) § 1405.

[3]Clayton *v.* Ashdown (1714) 9 Vin. Abr. 393.

[4]Hatton *v.* Gray (1684) 2 Ch. Cas. 164; Armstrong *v.* Maryland Coal Co. (1910) 67 W. Va. 589, 598.

[5]Gibson *v.* Brown (1905) 214 Ill. 330.

[6]3 COLUMBIA LAW REVIEW, 2.

[7]Jenkins *v.* Locke (1894) 3 App. Cas. (D. C.) 485; Rider *v.* Gray (1856) 10 Md. 282.

[8]Reese Co. *v.* House (1912) 162 Cal. 740.

gives to the optionee only an action for damages.[9] But the authorities are practically unanimous in holding an option on valuable consideration to be an irrevocable offer,[10] and that an acceptance within the life of the option creates a specifically enforcible contract, despite the attempted retraction.[11] And since, in strict theory, equity is enforcing a new contract, rather than the option, it does not inquire into the adequacy of the consideration for the latter.[12] On the other hand, there is a sharp division of authority on the question of the specific enforcement of options under seal, depending in part upon the different values accorded the seal in various jurisdictions. It is held by some courts that the seal estops the optionor to deny the payment of consideration;[13] while in other jurisdictions the seal is either held to be only *prima facie* evidence of consideration,[14] or is wholly disregarded.[15] And it seems that the last view is the only sound one, since equity usually denies its remedies to a covenantee who has given no actual consideration.[16]

Upon the principles above discussed the doctrine of mutuality seems clearly inapplicable to ordinary unilateral contracts. Yet in a few jurisdictions a stubborn adherence to the antiquated formula of mutuality has permitted this defense against a plaintiff who has already supplied the consideration for the defendant's promise.[17] The question was raised in a recent Michigan case, *Howe* v. *Benedict* (1913) 142 N. W. 768, in which a testatrix had offered to devise land to the plaintiff if he would care for her until her death. The plaintiff had fulfilled the terms of the offer; and, although the plaintiff had assumed no obligation to perform, specific performance was granted him against the devisee.

Want of mutuality of obligation more frequently prevails as a defense to a bill for specific performance or injunction, if the plaintiff's option is negative, that is where he may terminate the contract after notice to the defendant.[18] This result is more easily reached on the

[9] Ashley, Contracts, § 13; Page, Contracts, § 35; 1 California Law Rev. 222. Even under this view, it would seem that an injunction might lie to restrain the breach of the contract.

[10] Adams *v.* Peabody Coal Co. (1907) 230 Ill. 469; Bradford *v.* Foster (1888) 87 Tenn. 4. This legal paradox may be explained upon the ground that an option is practically valueless commercially if the optionee is limited to a suit at law for the withdrawal of the offer. Watts *v.* Kellar (C. C. A. 1893) 56 Fed. 1.

[11] Guyer *v.* Warren (1898) 175 Ill. 328; Mier *v.* Hadden (1907) 148 Mich. 488.

[12] Smith *v.* Bangham (1909) 156 Cal. 359; Ross *v.* Parks (1890) 93 Ala. 153; but see Rude *v.* Levy (1908) 43 Colo. 482.

[13] Watkins *v.* Robertson (1906) 105 Va. 269; O'Brien *v.* Boland (1896) 166 Mass. 481.

[14] Borel *v.* Mead (1884) 3 N. Mex. 84.

[15] Corbett *v.* Cronkhite (1909) 239 Ill. 9; Storch *v.* Duhnke (1899) 76 Minn. 521.

[16] 3 Pomeroy, Eq. Juris. (3rd ed.) § 1293.

[17] See Bear Track Min. Co. *v.* Clark (1898) 6 Ida. 196; Levin *v.* Dietz (1909) 194 N. Y. 376.

[18] Iron Age Pub. Co. *v.* W. U. Tel. Co. (1887) 83 Ala. 498; Dockstader *v.* Reed (N. Y. 1907) 121 App. Div. 846. 9 COLUMBIA LAW REVIEW, 540. Lack of mutual obligation underlies the want of mutuality of remedy, through which this result is sometimes reached. Marble Co. *v.* Ripley (1870) 10 Wall. 339, 359.

ground of equity's refusal to decree a vain thing, since the plaintiff might render its order nugatory at will.[19] The trend of the later cases, however, is towards the acceptance of a more reasonable view, that if the contract is equitable the plaintiff should be given the relief demanded, on the principle that his appeal to chancery is a guaranty of his willingness to perform.[20]

INSURABLE INTEREST IN FIRE AND LIFE POLICIES.—There is no little confusion in the books over the determination of the question as to the extent of the interest which the assured must have in the subject matter of the contract of insurance in order to purge the transaction of the taint of wager and speculation. The question has recently arisen in the case of *Oatman* v. *B. & M. Mut. Fire Relief Assn.* (Ore. 1913) 133 Pac. 1183. The court held that a husband who had insured his wife's property in which he had no rights, could not recover from the insurer when the property was destroyed. The decision is consistent with the better view of the law, inasmuch as in cases of ordinary fire and marine policies the engagement of the insurer is merely to indemnify, the proof of the loss being a condition precedent to recovery on the contract.[1] It does not follow, however, that since there must be interest at the time of the happening of the event against which the policy insures, that in absence of a stipulation to such effect in the policy,[2] the contract is invalid, if the insured has no interest in the property at the time the contract was made.[3] Some of the authorities refuse to sanction this rule, not only on the ground that it would be a wager contract to insure against loss from the destruction of property in which there were no present interest, but also because it would present a strong temptation to destroy the res, and therefore, against public policy.[4] But these arguments are not sound, when it is remembered that the assured cannot enforce the contract, unless he shows that he had acquired an interest in the property before its destruction, for otherwise, he has suffered no loss.

The cases are no more harmonious in stating how great the interest at the time of the accident must be to warrant a recovery. While the

[19]Rust *v.* Conrad (1882) 47 Mich. 449; Ulrey *v.* Keith (1908) 237 Ill. 284.

[20]Phila. Ball Club *v.* Lajoie (1902) 202 Pa. 210; McCall Co. *v.* Wright (1910) 198 N. Y. 143. The last cited case was based on a bill for injunction, and the court limited the doctrine of Dockstader *v.* Reed, *supra,* to bills for specific performance.

[1]Hartford Fire Ins. Co. *v.* Keating (1897) 86 Md. 130, 143; Castellain *v.* Preston (1883) L. R. 11 Q. B. D. 380; Carter *v.* Humboldt Fire Ins. Co. (1861) 12 Ia. 287.

[2]If an interest at the time of the inception of the contract is made part of the policy it is material to the insurer's undertaking. And it is obvious that he can stipulate that he shall not be bound unless an interest did exist. See Howard *v.* The Lancashire Ins. Co. (1885) 11 Can. S. C. 92.

[3]Marine Boston Ins. Co. *v.* Globe Fire Ins. Co. (1899) 174 Mass. 229; Fire Sun Ins. Office of London *v.* Merz (1899) 64 N. J. L. 301.

[4]Ohio Farmers Ins. Co. *v.* Vogel (1903) 30 Ind. App. 281; Clinton *v.* Norfolk M. Fire Ins. Co. (1900) 176 Mass. 486; Carpenter *v.* Providence Wash. Ins. Co. (1842) 16 Pet. 495, 503; Sadler's Co. *v.* Badcock (1743) 2 Atk. 554.